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No. 87

In the Supreme Court of the United States

OCTOBER TERM, 1950

WALTER K. WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the District Court for the Southern District of New York (R. 97–109, 115–116) are reported at 75 F. Supp. 210 and 76 F. Supp. 735. The opinions of the Court of Appeals for the Second Circuit (R. 137–141, 154–157) are reported at 179 F. 2d 919.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1949 (R. 142). A timely petition for rehearing (R. 143–153) was denied on March 2, 1950 (R. 154–157). The petition for a writ of certiorari was filed on May 24, 1950. The

jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below erred in holding that, in the circumstances of this case, petitioner's claim to maintenance and cure was barred by his own gross fault.

TREATY INVOLVED

Article 2 of the Shipowners' Liability Convention, 1936, 54 Stat. (Pt. 2) 1693, provides:

ARTICLE 2

1. The shipowner shall be liable in respect of—

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement;

(b) death resulting from such sickness or injury.

2. Provided that national laws or regulations may make exceptions in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the willful act, default, or misbehavior of the sick, injured, or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly at-

tributable to sickness, if at the time of the engagement the person employed refused to be medically examined.

STATEMENT

This suit was instituted by petitioner in the District Court for the Southern District of New York by libel filed on March 2, 1945 (R. 1, 3–6). Petitioner sought to recover maintenance and cure from the United States, as owner, and from American South African Line, Inc., the Government's general agent or ship's husband, as "operator," of the steamship *Anna Howard Shaw*.[1] Answers were filed by both named respondents (R. 7–11, 13–15), both of which raised the defense, *inter alia*, that the claim for maintenance and cure was barred by petitioner's gross fault or his deliberate act of indiscretion (R. 9, 14).

The case was tried on October 29 and October 30, 1947 (R. 31–90). Briefly, the pertinent facts, as found by the district judge, are as follows (R. 101–102):[2] Petitioner, a messman aboard the

[1] The title of the libel indicated that it was an action for "wages, overtime and maintenance" (R. 3). The claim for wages and overtime was abandoned during the trial (R. 52) and the case was maintained solely as one for maintenance and cure.

[2] The facts found by the district court are derived from the testimony of petitioner at the trial. As in most cases of this type, such testimony is the only direct evidence available to the shipowner. In this connection, it may be noted that petitioner gave conflicting accounts of the nature of the accident for other purposes. For example, the Stapleton Hospital history indicates a statement by petitioner that he leaned against a guard rail which broke (R. 94a). Petitioner's administrative claim states that the railing around the balcony at the

Anna Howard Shaw, went ashore on leave while the vessel was in the Bay of Naples on October 30, 1944. Together with two other members of the crew, he spent some time sightseeing in the water-front town of Bagnoli, stopping at various stores and drinking a bottle of wine. After a time, they entered a dance hall and stayed about an hour and a half, most of which time, according to petitioner, was spent in dancing. Petitioner entered an adjoining room in the dance hall, overlooking the sea, which had French doors reaching to the level of the floor. Outside of the room petitioner observed a wholly unprotected ledge which extended out from the building some two or three feet. Petitioner went out on this ledge to a position where the toes of his shoes were about six inches from the edge and leaned over, at the same time taking hold of a half-inch rod which was apparently affixed to the building to his right. As he grasped the rod and leaned over the edge, the rod came off and petitioner lost his balance and fell, fracturing his right lower leg.[3]

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dance hall broke (R. 93). The deck log of the vessel, based on petitioner's statement, indicated that petitioner fell off a cliff (R. 86).

[3] Petitioner was immediately hospitalized in Naples, where his leg was set and put in a cast (R. 40–41). He was subsequently flown home and treated at the Jackson Memorial Hospital in Miami, the Stapleton Marine Hospital at Staten Island and the Detroit Marine Hospital (R. 40–44, 91a–91b). The transportation as well as the hospitalization and care were, of course, without cost to petitioner.

The district court awarded maintenance to petitioner in the amount of $644.16[4] and entered a decree for that sum against the general agent, American South African Line, Inc. (R. 109). The libel was dismissed as to the United States on a venue point, namely, that the ship was not present in the district at the time that the libel was filed (R. 99). The general agent, American South African Line, Inc., was held answerable as the operator of the vessel under this Court's decision in *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707 (R. 99–101).[5]

On the merits, the district court held that petitioner was not precluded from claiming maintenance solely by virtue of the fact that he was ashore for his own recreational purposes (R. 103–107). Further, the district court held that petitioner was "less sober than he says he was, but * * * not so under the influence of liquor as to be barred from recovery" (R. 108).[6] The final question on the merits was whether petitioner's injury was the result of his own gross fault. As to petitioner's course of action on the ledge, the district court described going on the ledge as a "perilous under-

[4] This amount apparently represents a daily allowance for periods December 21, 1944, to February 27, 1945, and May 29, 1945, to July 1, 1945 (R. 55).

[5] This holding was affirmed on rehearing (R. 115–116).

[6] The record of the Army hospital in Naples, made at the time of petitioner's entrance, indicated acute alcoholism (R. 73).

taking" and leaning over the edge as "even more perilous" (R. 102). Further, the district court recognized that petitioner took only a "casual glance" at the rod on the wall, which looked like a "lightning arrester or something of that type," and made no claim to having done more (R. 102). However, the district court felt that petitioner's conduct fell short of the recklessness which would serve to bar his claim (R. 108–109).

An appeal was taken by the general agent from the decree entered against it by the district court (R. 125).[7] Petitioner cross-appealed from the decree which dismissed the libel as against the United States (R. 132–133). During the pendency of the appeal this Court handed down its decision in *Fink* v. *Shepard SS Co.*, 337 U. S. 810, and, accordingly, the decree against the general agent was reversed by agreement of the parties (R. 138). The dismissal of the libel as against the United States on the ground of improper venue was also reversed (R. 138–139), and the court below proceeded to consider the case on the merits as against the United States.

The doctrine of *Aguilar* v. *Standard Oil Company*, 318 U. S. 724, was interpreted and applied as permitting recovery of maintenance and cure unless

[7] The general agent's brief urged three grounds for reversal: (1) that as general agent it was not liable for maintenance; (2) that a shipowner is not liable for maintenance where the seaman is injured while engaged in recreational activities; (3) that petitioner could not recover because injured as a result of his own gross fault or indiscretion.

the seaman's injury resulted from his willful misbehavior or gross fault (R. 139–140). After reviewing the facts, the court below concluded that petitioner's actions, in circumstances of danger, did not show "* * * even a minimal degree of regard for the consequences of his act" and, accordingly, found his claim to maintenance and cure barred by his own gross fault (R. 139–141).

A petition for rehearing was filed which raised for the first time the contention that the liability of the United States for maintenance and cure was absolute by virtue of Article 2 of the Shipowners' Liability Convention, 1936, *supra*, pp. 2–3 (R. 151–153). The substance of petitioner's contention was that clause 1 of Article 2, placing liability for maintenance and cure on the shipowner, was in effect and binding, but that clause 2 of Article 2, permitting an exception where the injury had resulted from the willful act, default or misbehavior of the claimant, was not self-executing and, accordingly, not in effect (R. 152). Upon consideration of the petition for rehearing, the court below held, one judge dissenting, that Article 2, if self-executing, was in effect as a unit and that it required no legislation to make it operative (R. 154–157).

ARGUMENT

Petitioner asserts that the court below erred in rejecting his claim to maintenance and cure, basing his contention on either of two grounds:

First, he contends that clause 1 (a) of Article 2 of the Shipowners' Convention, 1936, *supra*, p. 2, is self-executing, and that a shipowner's duty thereunder to provide maintenance and cure is absolute in the absence of legislation by the Congress putting into force the exceptions permitted by clause 2 (b) of Article 2 of that Convention (Pet. 4–5, 20, 22–23, 24). Secondly and alternatively, petitioner contends that if clause 2 (b) of Article 2 of the Convention is self-executing, recreational activities and conduct at the time he incurred the injury were not such as would defeat his claim to maintenance and cure under that clause or under the general maritime law (Pet. 5–6, 11–14, 25–33).

1. Under petitioner's first point he contends that the United States, as the owner of the ship, is made absolutely liable for his maintenance and cure by clause 1 (a) of Article 2 of the Convention (Pet. 4–5, 22–33). Petitioner seeks his principal support for this contention in the separate opinion of Mr. Chief Justice Stone in the case of *Aguilar* v. *Standard Oil Company*, 318 U. S. 724, 738, wherein Mr. Chief Justice Stone dissented from the majority decision in the *Aguilar* case, but briefly concurred in the result in the companion case of *Waterman Steamship Corp.* v. *Jones*[8] on the ground that clause 1 (a) of Article

[8] It should be noted that *Waterman Steamship Corp.* v. *Jones*, No. 582, Oct. T., 1942, which was considered with and decided with the *Aguilar* case, involved events occurring subsequent to the effective date of the Shipowners' Liability Convention.

2 of the Shipowners' Liability Convention was self-executing but that clause 2 (a) of that Article permitting exceptions for injuries incurred otherwise than in the service of the ship was not operative in the absence of legislation putting it into effect.

The majority of the court below after careful consideration reached the conclusion that if clause 1 of Article 2 is self-executing, clause 2 of that Article is likewise self-executing, unless the language "national laws or regulations" appearing in the latter clause must be read so as to exclude "decisional laws." Hence, the majority of the court below interpreted the language "national laws or regulations" as including the pertinent principles of general maritime law as enunciated and enforced by the courts of the United States as well as laws enacted by the Congress. As the majority opinion states, great respect is due to the opinion of Mr. Chief Justice Stone on the point, but the statement in his opinion discloses no reasoning, or statement from the history of the Convention Conference to support it. On the other hand, there are plausible and sound reasons underlying the interpretation placed by the majority of the court below on Article 2.

Clauses 1 and 2 of Article 2, combined are clearly declaratory of the pertinent principles of the general maritime law as enforced by the courts of the United States. See *Aguilar* v. *Standard Oil Company, supra,* wherein this Court recog-

nized that a shipowner's liability to a seaman for maintenance and cure from the beginning to the end of the voyage is traditional, but that it is subject to certain exceptions which are set forth in the opinion in terms plainly synonymous with the terms that specify the exceptions permitted by clause 2 of Article 2 of the Convention. Thus, Article 2 of the Convention is merely declaratory of the pertinent general maritime law, since clause 1 of that Article recognizes the traditional liability of a shipowner for maintenance and cure and measures the period during which that liability may arise, and clause 2 specifies only the exceptions which the courts of the United States have long permitted. In the circumstances, there was existing law in the United States at the time of the adoption of the Convention which embodied the exceptions permitted by clause 2 of Article 2 thereof. The majority offered several suggestions to indicate the improbability that the Convention Conference intended that clause would not be operative without Congressional legislation (R. 156), all of which suggestions we believe to be sound. And there are other sound indications that the Conference had no such intention.

For example, if there had been in force on the effective date of the Convention a statute embodying the exceptions permitted by clause 2, it is obvious that the statute would not have been repealed by the Convention and it would not, therefore, have been necessary to reenact it in order

to make the exceptions contained in clause 2 operative. This would be so because the Convention would not be inconsistent with the statute, which would have permitted them to stand together. The same would be true of a duly promulgated regulation. Like reasoning dictates that the Convention, which was not inconsistent with the pertinent principles of the general maritime law in force in the United States on the date it was adopted, did not operate to abolish or repeal those principles. Consequently, those principles are still in force and effect in the United States, and, like the case of an already existing statute, no further legislation is necessary to make them operative.

Moreover, it is illogical to assume that the Conference was concerned with the form which the national laws necessary to carry the Convention into force would take. It was notorious that the various nations had different systems of law and different methods of enforcement, and the Conference was well aware of that fact. It is scarcely likely that the Conference expected that it could bring all of the participating nations under one form of law. Why then would it have an interest in insisting that all of the laws of the various nations on the subject be in statutory form? We submit that no such result was contemplated by the Conference. The history of the Convention Conference is barren of any informa-

tion to indicate that the Conference was concerned with the manner in which any of the subscribing nations would enforce the exceptions which the Convention permits. In this connection it may be noted that lists of specific questions were distributed to the various nations participating in the International Labour Conference concerning the nature of the provisions to be included in the convention, and responses to those questions were submitted. Many of the responses were rather elaborate, especially with respect to the questions which suggested exceptions. It is significant, however, that in none of the responses is there any requests or suggestions that the exceptions would have to take the form of national statutes before they would become operative in nations where the principles of the general maritime law were already recognized or enforced in another form. See Report II, International Labour Conference on the protection of seamen in case of sickness or accident, 1931, pages 1–108.

As indicated by petitioner, there are certain statements, made by the Secretary of State and others, appearing in the legislative background of H. R. 6881 (76th Cong., 1st sess.), a bill to implement the Convention, but which was never passed, which evidence a view that Article 2 could be split and considered as partially self-executing and partially in need of statutory implementa-

tion.[9] These statements, like those of Mr. Chief Justice Stone in the *Aguilar* case, are not supported by reasoning; nor is it clear that "decisional law" was under consideration when the statements were made. There are, however, contrary indications in the same legislative background. Recognizing that there had been considerable discussion as to the self-executing nature of articles in the Convention, the House Committee on Merchant Marine and Fisheries, in its report on H. R. 6881, specifically stated that it would not "* * * undertake to say that the convention or any part thereof [was] self-executing. * * *" and that it would not "* * * concede that any part of the draft convention [was] self-executing. * * *". H. Rep. 1328, 76th Cong., 1st sess., pp. 2, 3, 4. We do not urge that any part of the legislative history of a bill never enacted can be controlling. However, if weight is to be accorded to the statements indicated by petitioner, we submit that the views of the controlling committee likewise deserve to be considered. Far more compelling considerations, we submit, are to be found in the logic and fairness of the interpretation placed upon Article 2 by the court below, for the net result

[9] Petitioner incorrectly seeks to find support for this view in the Government's brief in *Farrell* v. *United States*, 336 U. S. 511 (Pet. 7). The Government did not urge, nor did the court find, that part of an article could be considered self-executing and the remainder of the same article inert. Moreover, the *Farrell* case involved Article 4 of the Convention, not the article here presented.

of the technical interpretation urged by petitioner would be to benefit only those seamen "* * * least deserving of protection, since their sickness or injury resulted from their own default or was intentionally concealed from their employer (R. 156).

2. Petitioner's second and alternative contention that, assuming clause 2 (b) of Article 2 to be self-executing, his activities at the time he incurred the injury were not such as to defeat his claim to maintenance and cure under either the Convention or the general maritime law, is, we submit, refuted even by this Court's pronouncements in the case of *Aguilar* v. *Standard Oil Co., supra,* so far as general maritime law is concerned.[10] In *Aguilar,* this Court fully reviewed a seaman's traditional right to recover maintenance and cure for injury or sickness and indicated that the right existed unless the injury resulted from some "* * * disqualifying misconduct * * *." 318 U. S. at page 734. Various phrases were used to guide inquiry into the type of disqualifying misconduct intended. For example, the court stated that only "* * * some willful misbehavior or deliberate act of indiscretion * * *" would suffice to remove the protection; that the protection was owed by

[10] Should the writ be granted, we will urge that the dicta in the *Aguilar* case be reconsidered and the application of that case brought into harmony with the law of other maritime nations and of other forms of workmen's compensation.

the shipowner regardless of fault "* * * unless gross * * *." 318 U. S. at pp. 731, 734.

It can scarcely be denied that petitioner's conduct in this case was a deliberate act of indiscretion, for it was done in reckless disregard for his own safety while he was exhilerated to some extent by the influence of alcohol.[11] It is true that the court below spoke of the term "gross negligence" as representing a type of conduct that will defeat recovery, rather than the term "gross fault" used by this Court in the *Aguilar* case to characterize the types of conduct that will defeat a seaman's right under the general maritime law to recover maintenance and cure. However, the court below concluded, in effect, that petitioner acted in reckless disregard for his own safety (R. 141), which conduct is plainly of the type which will defeat recovery under this Court's pronouncement in the *Aguilar* case. Thus, petitioner's act falls squarely within one of the types of conduct which this Court has indicated will bar recovery under the general maritime law.

Furthermore, the language used in clause 2 (b) of Article 2 of the Convention to characterize the type of misconduct that will defeat a seaman's right to recover maintenance and cure, is "wilful act, default or misbehavior." This lan-

[11] The trial court found that petitioner was not drunk, but that he was less sober than he claimed to be, although the court stated that he was not so under the influence of liquor as to be barred from recovery (R. 108).

guage is plainly synonymous with the various phrases, including the phrase "deliberate act of indiscretion," used by this Court in the *Aguilar* case to indicate the types of conduct that will defeat recovery under the general maritime law. It is true that at the time clause 2 (b) of Article 2 (then Article 3) was before the Committee of the International Labour Conference on the protection of seamen in case of sickness or accident, an amendment was offered to substitute for the words "wilful misconduct" (then appearing in the draft of that clause) the words "gross negligence." However, this amendment was not adopted, since by compromise the word "wilful" was retained and the words "act, default or misbehavior" were substituted for the word "conduct." See Record of Proceedings, International Labour Conference, Twenty-First Session and Twenty-Second Session, Geneva, 1936, page 250. We do not believe that the rejection by the Committee of the words "gross negligence," in view of its acceptance of words synonymous with those used by this Court in the *Aguilar* case, can reasonably imply an intention on the part of the Conference to remove from disqualifying conduct an act by a seaman which is done in reckless disregard for his own safety, even though such act might also be considered to be grossly negligent, as the majority of the court below apparently

considered it to be in this case.[12] Thus, assuming that clause 2 (b) of Article 2 is self-executing, the Convention requires no different result in this case from that which would be required by the general maritime law as patterned by this Court. On the same assumption, the majority of the court below were clearly correct in holding that petitioner was not entitled to recover.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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[12] The majority of the court below stated that the words "wilful act, default or misbehavior" now appearing in clause 2 (b) of Article 2 of the Convention are synonymous with the words "gross negligence." This statement, even if it be inaccurate, which we do not concede, cannot alter the fact that those words are synonymous with the words "deliberate act of indiscretion" used by this Court in the *Aguilar* case or the further fact that they squarely cover petitioner's conduct in this case.

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